ORAL ARGUMENT DATE: NOT SCHEDULED

Nos. 10-1300, 10-1301, 10-1353 & 10-1355

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

E.I. DUPONT DE NEMOURS AND COMPANY,
Petitioner / Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent / Cross-Petitioner,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION,
Intervenor.

On Petitions for Review and Cross-Applications for Enforcement of Decisions and Orders of the National Labor Relations Board

BRIEF FOR INTERVENOR UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (and its predecessors) was the charging party before the National Labor Relations Board (NLRB) and is the intervenor in this proceeding. E.I. DuPont de Nemours, Louisville Works and E.I. DuPont de Nemours and Company were the respondents before the NLRB and are the petitioners / cross-respondents in this proceeding. The NLRB is the respondent / cross-petitioner in this Court.

B. Rulings Under Review. This case involves petitions for review and cross-petitions for enforcement of two decisions of the NLRB: *E.I DuPont de Nemours, Louisville Works*, 355 NLRB No. 176 (Aug. 27, 2010), and *E.I. DuPont de Nemours & Company*, 355 NLRB No. 177 (Aug. 27, 2010).

C. Related Cases. These cases have not previously been before this Court or any other court. Counsel for intervenor is not aware of any related case currently pending in this Court or any other court.

/s/ Matthew J. Ginsburg
Matthew J. Ginsburg

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GLOSSARY

ALJ	Administrative Law Judge
JA	Joint Appendix
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board

BRIEF FOR INTERVENOR
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION

STATUTORY PROVISIONS

All relevant statutory provisions are contained in the Statutory Addendum to the National Labor Relations Board's brief.

STATEMENT OF FACTS

In the mid-1990s, the local union at DuPont's Louisville, Kentucky facility and the local union at DuPont's Edge Moor, Delaware facility each signed collective bargaining agreements that permitted DuPont to provide employee benefits through DuPont's company-wide cafeteria benefits plan, the BeneFlex Flexible Benefits Plan, and its component plans, including the BeneFlex Medical Care Plan. In 2002 and 2004 respectively, the collective bargaining agreements at the Louisville facility and the Edge Moor facility expired. During the hiatus period between the expiration of each contract and the negotiation of a new agreement at each facility, DuPont unilaterally changed the Flexible Benefits Plan and its component plans, including the health benefits available to bargaining unit members.

The unions each filed unfair labor practice charges with the NLRB contending that these unilateral changes were unlawful. The Board's General Counsel issued complaints against DuPont in each case, charging that the Company had committed unfair labor practices in violation of Sections 8(a)(5) and 8(a)(1) of the Act. The Board issued decisions and orders in each case finding that DuPont's unilateral changes violated the National Labor Relations Act.

A. THE BENEFLEX FLEXIBLE BENEFITS PLAN AND THE BENEFLEX MEDICAL CARE PLAN

In 1993, the Edge Moor Union agreed in collective bargaining with DuPont that, effective January 1, 1994, employees would receive benefits through the BeneFlex Flexible Benefits Plan and Medical Care Plan. JA 625, ¶ 7, 626, ¶ 11. The collective bargaining agreement at Edge Moor was later amended to state that "employees shall . . . receive benefits as provided by the Company's Beneflex Benefits Plan [sic], subject to all terms and conditions of said Plan," in addition to receiving preexisting enumerated benefits including a pension and retirement plan, a short-term disability plan, and a total and permanent disability plan. JA 706-07. In 1994, the Louisville Union agreed in its collective bargaining agreement with DuPont that, effective January 1, 1995, "[t]he COMPANY will provide basic Hospital and Medical Surgical coverage as set forth in the DuPont BeneFlex Medical Care Plan," in addition to a list of preexisting benefits similar to those at the Edge Moor facility. JA 169, 503-04. The plan documents for both the BeneFlex Flexible Benefits Plan and the BeneFlex Medical Care Plan contained standard "Modification or Termination of the Plan" clauses stating: "The Company reserves the sole right to change or discontinue this Plan in its discretion provided, however, that any change in price or level of coverage shall be announced at the time of annual enrollment and shall not be changed during a Plan Year unless coverage provided by an independent, third-party provider is significantly curtailed or decreased during the Plan Year."[1] JA 741, 757, 778.

The BeneFlex Flexible Benefits Plan and Medical Care Plan are companywide Plans that are available to employees at all DuPont sites in the United States. JA 144-45, ¶ 6. Contrary to DuPont's characterization in its Statement of Facts, however, the Plans are not "uniform[] across the entire pool of [Plan] participants." DuPont. Br. 19-20. Rather, the Plan allows DuPont to vary the benefit options available to employees from one facility to another as well as to charge employees different costs for benefits on a facility-by-facility basis. In fact, the record demonstrates that DuPont has a history of doing so.

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[1] All benefit plans contain provisions similar to the "Modification or Termination" clause in DuPont's plan. *Compare* JA 778 ("The Company reserves the sole right to change or discontinue this Plan in its discretion.") *with Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 76 (1995) ("The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan."). Such reservations are necessary because, as a matter of trust law, "for a plan *not* to have such a procedure would risk rendering the plan forever unamendable under standard trust law principles." *Id.* at 82, *citing* Restatement (Second) of Trusts, § 331(2) (1957).

As an initial matter, while the Flexible Benefits Plan and its component plans, including the Medical Care Plan, are generally open to all DuPont employees, the plan document states that "[b]enefits under th[e] Plan shall not apply to any employee or the dependent(s) of any employee in a bargaining unit represented by a union for collective bargaining unless and until collective bargaining on the subject has taken place and any requisite obligations thereunder have been fulfilled." JA 744, 749. As DuPont's Senior Consultant "primarily responsible for the DuPont US Region, Health and Welfare Benefit policy and plan design" explained in her testimony, at unionized facilities "Beneflex itself must be bargained, that's contained in the plan document." JA 63.

DuPont has bargained (or been ordered to bargain) with unions at a number of its facilities over the particular terms on which the BeneFlex Flexible Benefits Plan is available to bargaining unit members. When the Union at the Louisville facility first agreed to accept the BeneFlex Medical Care Plan in 1994, an NLRB Administrative Law Judge found that the parties bargained for specific employee health care benefit costs (premiums, co-payments and deductibles) during the Plan's first year. *See generally* JA

208-29. As a result, during the 1995 plan year unionized employees at the Louisville facility paid less for BeneFlex Medical Care benefits than employees at other DuPont facilities. JA 227; JA 145-46, ¶ 9. The same was true at DuPont's Tonawanda, New York facility (the "Yerkes" plant), where – as the result of the resolution of an unfair labor practice charge – unionized employees paid reduced premiums for BeneFlex Medical Care benefits during every year from 1996 through 2002. JA 145, ¶ 8, 203. Finally, a similar situation occurred at DuPont's Waynesboro, Virginia facility, where an NLRB Administrative Law Judge ordered DuPont to provide bargaining unit members with Blue Cross/Blue Shield health benefits after DuPont unilaterally replaced these benefits with the BeneFlex Medical Care Plan. *See E.I. Du Pont de Nemours & Co.*, 5-CA-24621, 5-CA-24709, 5-CA-24820, 5-CA-24846, 5-CA-25690, 1997 NLRB LEXIS 315, *130 (April 25, 1997).

The BeneFlex Medical Care Plan itself explicitly permits DuPont to offer different health insurance options at different facilities. The Medical Care Plan's plan document sets forth a number of plan options that *may* be available at different DuPont facilities, such as a Preferred Provider Organization option or a Consumer Choice option, and then states that, in addition, "Alternative Coverage may be elected, including but not limited to

Blue Cross/Blue Shield or a health maintenance organization (HMO) *if it is available at the employee's location*." JA 767-69 (emphasis added). As DuPont's Senior Consultant for "Health and Welfare Benefit policy and plan design," JA 44, explained, "[t]he Beneflex Medical Plan contains a number of different plan options. Some of these options are national plan options such as our point of service, consumer choice and high deductible PPO. But at a few selected sites we have an . . . alternative option." JA 59.

In fact, DuPont advertised to employees the company's ability to craft specific health care options at different facilities under the BeneFlex Medical Care Plan. In an annual "Plain Talk" publication – a publication that DuPont sent to every employee who participated in the BeneFlex Flexible Benefit Plan – DuPont stated that to respond to employees' "desire for additional 'choice' in their medical benefits," DuPont would provide new health insurance options such as "a choice of . . . carriers" or "an entirely new type of benefit plan." JA 291. Whether a particular plan option would be made available at a given facility, DuPont explained, would depend on factors such as "[w]hat kinds of plans are available in [an] area," "[h]ow difficult it is to implement a given choice," and "[w]hat specific needs and concerns have been expressed by employees." *Ibid.*

B. THE UNFAIR LABOR PRACTICES AT THE LOUISVILLE FACILITY

Following the implementation of the BeneFlex Flexible Benefit Plan and Medical Care Plan at Louisville in 1995, DuPont announced and implemented changes to both Plans for employees at the facility on an annual basis. JA 147, ¶ 15; JA 148, ¶ 17; JA 150, ¶ 22; JA 152, ¶ 26; JA 153, ¶ 28; JA 155-56, ¶ 33; JA 158, ¶ 42. Each of these changes were announced and implemented during the term of successive collective bargaining agreements between the parties. *Ibid.*

In February 2002, the Louisville union and DuPont began negotiations for a new collective bargaining agreement to replace the contract that was set to expire on March 21, 2002.[2] JA 159-60, ¶¶ 47-48. In fall 2002, while negotiations for a new agreement continued, DuPont presented the union with a series of changes to the BeneFlex Flexible Benefits Plan and Medical Care Plan for 2003. *Id.*, ¶ 52. The Union demanded bargaining over these changes, explaining that "any changes to the current Beneflex benefits are subject to good faith bargaining before implementation." JA 374; *see also* JA 161, ¶ 53. DuPont refused to bargain, stating that "it would be wholly inappropriate to engage in bargaining over the recently-announced changes to the Plan." JA 375; *see also* JA 162, ¶ 54.

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[2] DuPont contends in its brief that the parties "agreed that if agreement was not reached by contract expiration, DuPont would continue all terms and conditions of the contract day-to-day until something different was bargained." DuPont Br. 14. However, in its post-contract-expiration correspondence with the Union regarding changes to benefits, DuPont never relied on the supposed post-contract continuation of the management rights clause as a basis for its ability to make unilateral changes. For example, in an October 24, 2002 letter relating to DuPont's proposed 2003 changes, the Union stated that "Beneflex benefits are subject to good faith bargaining before implementation," further explaining that "[a]ny reliance on asserted management rights is misplaced because the collective bargaining agreement is expired." *See*, *e.g.*, JA 374. In two responsive letters, DuPont did not contest the Union's statement that the management rights clause had expired with the contract. JA 375, 383. The parties engaged in almost identical exchanges regarding DuPont's proposed 2004 and 2005 changes and, again,

On January 1, 2003, DuPont unilaterally implemented the announced changes to the Plans. JA 162, ¶ 55. These changes included increased employee premiums for health care coverage, the creation of a new health care option under the Beneflex Medical Care Plan, and the elimination of an existing option under the Medical Care Plan. *Ibid.* On June 2, 2003, the Union filed an unfair labor practice change with the NLRB alleging that DuPont had violated Section 8(a)(5) of the Act by unilaterally implementing these changes. JA 162, ¶ 57. The Board later dismissed this charge as untimely pursuant to Section 10(b) of the Act. *Ibid.*

DuPont never claimed that the management rights clause remained in effect. *See* JA 411, 412, 413, 425.

In fall 2003, while negotiations for a new collective bargaining agreement still continued, DuPont presented the Union with a series of changes to the BeneFlex Flexible Benefits Plan and Medical Care Plan for 2004. *Id.*, ¶ 58. The Union again demanded bargaining, explaining that "[o]nce again . . . any changes to the current Beneflex benefits are subject to good faith bargaining before implementation." JA 411; *see also* JA 163, ¶ 59. Again, DuPont refused to bargain, stating that "it would be wholly inappropriate to engage in bargaining over the recently-announced changes to the Plan." JA 412; *see also* JA 163, ¶ 60.

On January 1, 2004, DuPont unilaterally implemented the announced changes to the two Plans. JA 163-64, ¶ 62. These changes included further increases to employee premiums for health care coverage, a more restrictive definition of what children qualified as "eligible dependents" under the Medical Care Plan, a change to the benefits provided for infertility treatment under the Medical Care Plan, changes to Mental Health / Chemical Dependency Benefits, changes to the Health Care Spending Account Plan, a new feature for the BeneFlex Dental Care Plan feature, changes to the BeneFlex Vision Care Plan, the elimination of an option under the BeneFlex Financial Planning Plan, and the addition of a new BeneFlex Legal Services Plan. *Ibid.*; JA 415-18. On January 2, 2004, the Union filed an unfair labor practice charge with the NLRB, alleging that DuPont violated § 8(a)(5) of the Act by unilaterally implementing these changes. JA 68.

In fall 2004, while negotiations for a new agreement continued and the Union's January 2, 2004 unfair labor practice charge remained pending, DuPont presented the Union with a series of changes to the BeneFlex Flexible Benefits Plan and Medical Care Plan for 2005. JA 164, ¶ 63. The Union again demanded bargaining, again explaining that "[t]he Employer must bargain in good faith to impasse or agreement on any proposed changes." JA 423; *see also* JA 164-65, ¶ 64. DuPont again refused to bargain, stating that "it would be wholly inappropriate to engage in bargaining over the recently-announced changes to the Plan." JA 425; *see also* JA 165, ¶ 65.

On January 1, 2005, DuPont unilaterally implemented its proposed changes to the two Plans. JA 165, ¶ 66. These changes included new coverage levels and increased employee premiums for the Medical Care Plan, a redesign of the Catastrophic Medical Option, new coverage levels and increased employee premiums for the Dental Care Plan, new coverage levels under the Vision Care Plan, and increased employee premiums for the Financial Planning Plan. *Ibid.*; JA 427-30. On January 5, 2005, the union filed an additional unfair labor practice charge with the NLRB alleging that

DuPont violated Section 8(a)(5) of the Act by unilaterally implementing the January 1, 2005 changes. JA 165, ¶ 57.

The Regional Director of the NLRB issued a consolidated complaint against DuPont on March 18, 2005, JA 124-29, and a hearing was held before an Administrative Law Judge on June 21, 2005, JA 22. The ALJ dismissed the Board's complaint, holding that DuPont had "established a several year routine [of making regular annual changes to employee health benefits] amounting to a past practice which survived the contract and maintained the status quo." JA 26. The General Counsel and the Union filed exceptions to the ALJ's decision with the Board. JA 15. The Board reversed the ALJ's decision, concluding that DuPont violated Section 8(a)(5) of the Act. JA 17-18.

C. THE UNFAIR LABOR PRACTICE AT THE EDGE MOOR FACILITY

Following the implementation of the BeneFlex Flexible Benefit Plan and Medical Care Plan at Edge Moor in 1994, DuPont announced and implemented changes to both Plans for employees at the facility on an annual basis. JA 627, ¶ 13; JA 627-28, ¶ 15; JA 628, ¶ 17; JA 629-30, ¶ 19; JA 630-31, ¶ 21; JA 631-32, ¶ 24; JA 634-35 ¶ 30; JA 635-36, ¶ 32; JA 637, ¶ 34; JA 638, ¶ 37. Each of these changes was announced and implemented during the term of successive collective bargaining agreements in place between the parties. *Ibid.*

The collective bargaining agreement between the Edge Moor Union and DuPont expired on May 31, 2004. JA 640, ¶ 42. During bargaining, DuPont proposed an amendment to Article IX, Section 3 of the expired agreement – the paragraph incorporating the "BeneFlex Benefits Plan" into the contract – which, as amended, would have stated: "[T]he Union and Management agree that the provisions of this Section 3 shall survive the expiration of this Agreement and shall remain in full force and effect unless and until the Parties mutually agree to change or terminate this Section 3." JA 640, ¶ 43. The Union responded that it considered DuPont's proposal to constitute a permissive subject of bargaining and stated that it was not interested in bargaining over the proposal. JA 640-41, ¶ 45.

On October 11, 2004, while negotiations for a new agreement continued, DuPont presented the Union with a series of changes to the BeneFlex Flexible Benefits Plan and Medical Care Plan for 2005. JA 642, ¶ 53. The Union demanded bargaining, explaining that "[t]he Employer must bargain in good faith to impasse or agreement on any proposed changes." JA 643, ¶ 55. DuPont refused. JA 644, ¶ 58. On January 1, 2005, DuPont unilaterally implemented the announced changes to the two Plans. JA 644, ¶

58. These changes included the same extensive changes to employee benefits made at the Louisville facility, including an increase to employee premiums for health care coverage. *See* page 10, *supra*. On January 3, 2005, the union filed an unfair labor practice change with the NLRB alleging that DuPont violated § 8(a)(5) of the Act by unilaterally implementing these changes. JA 645, ¶ 60.

On March 21, 2005, while the unfair labor practice charge was still pending, DuPont withdrew its proposed amendment to Article IX, Section 3 of the contract and instead proposed simply to include "the expired Agreement's Section 3 of Article IX" in a new collective bargaining agreement. JA 839-40. DuPont explained that "[i]t is the Plant's understanding that ratification of a contract including this Beneflex language will be an acceptance of the 2005 Beneflex changes, at least upon the effective date of the new Collective Bargaining Agreement, and of Beneflex's *management rights clause* permitting the Company to make unilateral changes to Beneflex, at least during the term of the Agreement." JA 840 (emphasis added).

On March 31, 2005, the Regional Director of the NLRB issued a complaint against DuPont and a hearing was held before an Administrative Law Judge on September 13, 2005. JA 30. The ALJ concluded that DuPont had "violated Section 8(a)(5) and 8(a)(1) of the Act by unilaterally implementing changes to the benefits of unit employees at a time when the parties were engaged in negotiations for a collective-bargaining agreement and . . . had not reached impasse," reasoning that, whatever legal standard applied, "[t]he record shows that [DuPont] unilaterally implemented its 2005 changes when negotiations regarding those changes were still open." JA 39. In reaching this conclusion, the ALJ specifically noted that DuPont failed to offer "the testimony of a benefits administrator or other reliable evidence" to support its claim that "in 2005, the Company could not have provided its benefit plans to unit employees under the 2004 terms while the negotiations for a new contract were ongoing." JA 33.

DuPont filed exceptions to the ALJ's decision with the Board. JA 27. The Board affirmed the ALJ's decision, concluding that DuPont violated § 8(a)(5) of the Act. *Ibid.*

SUMMARY OF ARGUMENT

DuPont admits that it made unilateral changes to the employment benefits of union-represented employees at two of its plants during the period when the Company was negotiating successor agreements to the collective bargaining agreements that covered each of these facilities.

DuPont further admits that in each case the relevant Union requested bargaining over the changes to benefits and DuPont refused.

As a defense to the charge of bad faith bargaining, DuPont contends that the Unions expressly gave the Company permission to unilaterally change benefits by incorporating in their collective bargaining agreements benefit plan documents containing clauses giving DuPont the right to change benefits. This argument is unavailing because a union's contractual waiver of the right to bargain over an otherwise-mandatory bargaining subject expires with the agreement that contains it. DuPont's reliance on this Court's contract coverage doctrine is similarly unsuccessful because that doctrine concerns an employer's duty to bargain during the term of an agreement with respect to a matter covered by the contract. Because the relevant collective bargaining agreements had already expired at the time DuPont made unilateral changes to benefits, the Unions' contractual waivers did not provide DuPont with a defense.

As a fallback, DuPont argues that the Unions waived their right to bargain over the changes to benefits through their past practice of allowing the Company to make similar changes. The law is well-settled, however, that a union's past waiver of bargaining over a subject does not foreclose its right to bargain in the future. This rule has a practical basis. If the law were otherwise, a union could never safely enter into an agreement allowing an employer to act unilaterally on any term of employment or, for that matter, allow any unilateral change to pass without demanding bargaining, even if the particular change in question was not a matter of immediate concern.

DuPont also contends that it was privileged to unilaterally change benefits because it had a past practice of making such unilateral changes that constituted the "dynamic status quo." An employer is only entitled to unilaterally change conditions of employment as part of the dynamic status quo where the basis for such a regularly-occurring change is fixed or automatic. In contrast, where, as here, the substance of the changes to employment benefits lies within the sole discretion of the employer, the employer is required to bargain with the union over any changes.

ARGUMENT

This case concerns unilateral changes by DuPont to the employment benefits of union-represented employees at two plants made during the period when DuPont was negotiating successor agreements to the expired collective bargaining agreements covering those facilities. In each instance, DuPont refused to negotiate with the relevant union over the benefit changes.

Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," 29 U.S.C. § 158(a)(5), a practice which is defined by Section 8(d) of the Act as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment," 29 U.S.C. § 158(d). The Supreme Court has held that "[u]nilateral action by an employer without prior discussion with the union . . . amount[s] to a refusal to negotiate about the affected conditions of employment." *NLRB v. Katz*, 369 U.S. 736, 747 (1962). That being so, "an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

The Board in these cases found that DuPont "violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms of the employees' benefit plan at a time when the parties were negotiating for a collective-bargaining agreement and were not at impasse," concluding that the Company "failed to justify its unilateral conduct either by proving relevant past practice or the existence of . . . an agreement [to waive bargaining]." JA

15, 17. The Board is entitled to great deference when it exercises its "wide latitude to monitor the bargaining process." *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1031 (D.C. Cir. 1997). *See also American Fed. Of Television & Radio Artists v. NLRB*, 395 F.2d 622, 627 (D.C. Cir. 1968) ("[F]ew issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a board which deals constantly with such problems."). The Court should thus enforce the Board's orders reasonably finding that DuPont's unilateral changes to benefits violated the Act.

I. THE UNIONS' CONTRACTUAL WAIVERS OF THEIR RIGHT TO BARGAIN OVER CHANGES TO THE BENEFITS UNDER THE PLANS EXPIRED WITH THE COLLECTIVE BARGAINING AGREEMENTS

DuPont's principal defense against the charge of bad faith bargaining is that the unions expressly gave the Company permission to unilaterally change benefits by incorporating in their collective bargaining agreements a benefits plan document containing a clause giving DuPont the right to change benefits. DuPont Br. 27-38 & 47-50. The Board correctly held that the permission to unilaterally change benefits expired with the collective bargaining agreements.

Invoking this Court's "contract coverage" doctrine, DuPont asserts that "the alleged unilateral changes were 'covered by' union agreements and are not unlawful." DuPont Br. 27 (capitalized and boldfaced in original). This Court's "contract coverage" cases concern whether "there is [a] continuous duty to bargain *during the term of an agreement* with respect to a matter covered by the contract." *NLRB v. U.S. Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993) (emphasis added). Since the relevant collective bargaining agreements here had expired by the time DuPont unilaterally changed the benefits, the "contract coverage" doctrine is completely irrelevant to this case.[3]

DuPont argues that the expiration of the collective bargaining agreements is irrelevant, because "the Union was bound to the BeneFlex plan documents, including DuPont's reserved rights, all of which outlived the expiration of the applicable collective bargaining agreements." DuPont Br. 34. But the unions were "bound to the BeneFlex plan documents" only by virtue of their collective bargaining agreements with DuPont, and those agreements expired. The unions were not parties to the plan documents.[4]

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[3] For this same reason, DuPont's reliance on *BP Amoco Corp. v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000) as support for its "contract coverage" argument is unavailing. Unlike DuPont's post-contract-expiration changes, the unilateral changes to benefits made by the employer in *BP Amoco* occurred "during the term of [the] collective-bargaining agreements." *Amoco Chem. Co.*, 328 NLRB 1220, 1220 (1999).

[4] The fact that the unions were not parties to the plan documents distinguishes this case from *UMWA 1974 Pension v. Pittston Co.*, 984 F.2d

Contrary to the Company's suggestion, DuPont Br. 34-35, the fact that DuPont was required by the NLRA to continue providing benefits under the plan after the collective bargaining agreements expired does not convert the plan itself into an unexpired collective bargaining agreement. *See Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 541 (1988) (distinguishing "a contractual duty to make contributions to a pension fund during the term of the agreement" from "a duty under the National Labor Relations Act to continue making such contributions after the expiration of the contract and while negotiations for a new contract are in process").

Having failed to show the existence of "an express waiver" in effect at the time of the unilateral changes, DuPont argues, as a fallback position, "that a waiver may be inferred based on the parties' conduct." DuPont Br. 49. The settled law, however, is that a union's past waiver of bargaining over a particular matter does not foreclose its right to bargain in the future. "It is well settled that even past failure to assert a statutory right does not estop subsequent assertion of that right." *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1358 (D.C. Cir. 2008). Thus, regardless of any past

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469 (D.C. Cir. 1993), where the trustees of a pension plan sued employers for contributions due under plan documents containing an "evergreen" clause.

waiver of bargaining, "[e]ach time the bargainable incident occurs . . . [the] Union has the election of requesting negotiations or not." *Ibid.*, *quoting Ciba-Geigy Pharmaceuticals Div. v. NLRB*, 722 F.2d 1120, 1127 (3d Cir. 1983). As a practical matter, the law could not be otherwise. If it were, unions could never safely enter into agreements allowing employers to act unilaterally on any term of employment. Indeed, they could never safely allow a unilateral change to pass without demanding bargaining, even if the particular change in question was not a matter of immediate concern.

A union may waive its right to bargain over an otherwise mandatory subject during the term of a collective bargaining agreement through a management rights clause or other contractual waiver, such as the contract language at issue in these cases,[5] but such "[a] contractual reservation of management rights does not extend beyond the expiration of the contract in the absence of evidence of the parties' contrary intentions." *Long Island*

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[5] During bargaining and before the Board, DuPont accurately referred to the provision contained in each of the collective bargaining agreements as a "management rights clause" or "waiver . . . with respect to DuPont's right to make BeneFlex Plan modifications during the term of any collective bargaining agreement." JA 840; DuPont Br. in Support of Exceptions (Edge Moor) 47; DuPont Post-Hearing Br. (Edge Moor) 18-19. DuPont now characterizes each of the clauses as "a specific provision tailored to memorialize DuPont's agreed upon discretion to unilaterally modify Beneflex." DuPont Br. 31 n. 9. Either way, as we show in the text, the permission to act unilaterally expires with the agreement granting that permission.

Head Start Child Development Serv., Inc., 345 NLRB 973, 973 (2005), *vacated on other grounds*, 460 F.3d 254 (2d Cir. 2006). *See also* R. Gorman & M. Finkin, Basic Text on Labor Law 638 (2d Ed. 2004) ("The law is quite clear that, when a collective bargaining agreement expires, any management-rights . . . clause it contains expires with it."). "[T]he essence of the management-right clause is the union's waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls." *Beverly Health and Rehab. Serv., Inc.*, 335 NLRB 635, 636 (2001).

DuPont criticizes the Board's characterization of the Unions' contractual waivers as management rights clauses, DuPont Br. 31 n.9, but it is not at all uncommon for collectively bargained health or pension plans to contain a "standard reservation clause" of the sort relied upon by DuPont, reserving to the settlor-employer the option of modifying the benefits under the plan.[6] *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 76, 82

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[6] All of the cases cited by DuPont for the proposition that "[a] clear and unmistakable waiver may be inferred from past practice" involve the interpretation of unexpired collective bargaining agreements. DuPont Br. 49. *See Resorts Int'l Hotel Casino v. NLRB*, 996 F.2d 1553 (3d Cir. 1993) (there is not "any language in the agreement or any unmistakable expression of the Union waiving its right"); *Mt. Clemens Gen. Hosp.*, 344 NLRB 450, 460 (2005) ("[S]pecific contract language shows that the matter asserted to be waived was fully discussed and consciously explored and that the Union

(1995) ("[F]or a plan *not* to have such a[n] [amendment] procedure would risk rendering the plan forever unamendable under standard trust law principles"). For the reasons we have just explained, the Board has consistently held that any permission to act unilaterally granted by such a clause expires with the collective bargaining agreement incorporating the plan. *See*, *e.g.*, *Long Island Head Start*, 345 NLRB at 973, 975; *Mary Thompson Hosp.*, 296 NLRB 1245, 1249 (1989), *enfd.*, 943 F.2d 741 (7th Cir. 1991).

The *Courier-Journal* and *Capitol Ford* decisions relied upon by DuPont are not to the contrary. *See* DuPont Br. 42-47, citing *Courier-Journal*, 342 NLRB 1093 (2004); *Courier-Journal*, 342 NLRB 1148 (2004); *Capitol Ford*, 343 NLRB 1058 (2004). As the Board explained, the *Courier-Journal* decisions are "plainly distinguishable," because in those cases the "employer had established a past practice of making [unilateral] changes both during periods when a contract was in effect and during hiatus

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consciously yielded its interest in bargaining"); *Cal. Pac. Med. Ctr.*, 337 NLRB 910, 910 n. 1 (2002) ("[T]he parties' collective-bargaining agreement was a 'clear and unmistakable waiver' by the Union of its statutory right to bargain over the Respondent's decisions."); *Allison Corp*. 330 NLRB 1363, 1366 (2000) (considering "whether or not the Union waived its right to bargain . . . by agreeing to certain contractual language"); *KIRO, Inc.*, 317 NLRB 1325, 1328 (1995) (considering whether "[t]he management-rights clause at issue in this case . . . reserves to the Employer the right . . . to increase working hours").

periods." JA 15-16. DuPont's "asserted past practice," in contrast, "was limited to changes that had been made when a contract, which included the reservation of rights language, was in effect."[7] *Ibid.* *Capitol Ford*, as the Board explains in its brief, NLRB Br. 30-31, did not involve wide-ranging changes to employee benefits at all, but rather "an undisputed *Burns* successor employer" who unilaterally modified a small incentive program by dividing a total of $5,000 in bonuses not only among those employees who reached 90% productivity, as had been previously announced, but instead "includ[ing] every [employee] who had either reached the 90% mark or who had shown marked improvement." 343 NLRB at 1058, 1063-64.

The Board's interpretation of the *Courier-Journal* decisions as applying only to cases where an employer "established a past practice of making [unilateral] changes both during periods when a contract was in effect and during hiatus periods," JA 15, was reasonable, since, as the Board explained, "extending the holding in the *Courier-Journal* cases to th[e] situation [presented by DuPont's unilateral changes] would conflict with settled law and undermine established principles of collective bargaining," JA 27. The Board's careful work distinguishing its precedent from the facts of this case is entitled to deference.[8] *See Inland Lakes Management v. NLRB*, 987 F.2d 799, 805 (D.C. Cir. 1993) ("An agency may of course find that, although a rule in general serves useful purposes, peculiarities of the case before it suggest that the rule not be applied in that case." (internal quotation marks omitted)).

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[7] DuPont disingenuously claims that this case is like the *Courier-Journal* cases because "DuPont implemented changes to BeneFlex in 2003 during a hiatus period in Louisville." DuPont Br. 44. What DuPont fails to mention is that the Louisville Union demanded bargaining over the 2003 changes, JA 161, ¶ 53, 374, but that DuPont refused, JA 161, ¶ 54, 375. The Union then filed an unfair labor practice charge with the Board to protest DuPont's unilateral change. JA 162, ¶ 57.

In summary, it is not legally relevant that DuPont has previously made unilateral changes to the benefits. As the Board found, DuPont made those changes pursuant to the Unions' express permission to act unilaterally contained in the now expired collective bargaining agreements. The fact that the Unions acquiesced in past unilateral changes to benefits during a period when the contractual waiver of the right to bargain over these changes was in effect does not create the sort of past practice that may be continued over the Unions' demand to bargain, both because a management rights clause expires with the contract and because the "past failure to assert a statutory right does not estop subsequent assertion of that right." *S. Nuclear Operating Co.*, 524 F.3d at 1358.

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[8] Although the Board reasonably distinguished the *Courier-Journal* decisions and *Capitol Ford* here, the Board should, in a future appropriate case, overrule all three decisions because they are so strongly in tension with the well-established rules that a union's contractual waiver of a statutory right expires with the contract that contains it and that a union's acquiescence to an employer's past unilateral change does not affect the union's right to demand bargaining over the same subject in the future. Indeed, the then-Board-majority in the *Courier-Journal* decisions tacitly acknowledged these strong tensions when it refused to "pass on the legal issue of whether a contractual waiver of the right to bargain survives the expiration of the contract" and "f[ou]nd inapposite cases which hold that the union acquiescence in prior unilateral changes does not operate as a waiver of its right to bargain over such conduct for all time." *Courier-Journal*, 342 NLRB at 1095 & 1095 n. 6.

II. THE BOARD'S "DYNAMIC STATUS QUO" PRECEDENTS DID NOT PRIVILEGE DUPONT TO UNILATERALLY CHANGE BENEFLEX BENEFITS

DuPont's alternative defense is that "the unilateral changes to BeneFlex in 2004 and 2005 maintained the *status quo*." DuPont Br. 39. In arguing that the changes to the benefits of union-represented employees did not constitute the sort of changes it was required to bargain over, DuPont relies upon "long-standing precedent that an employer's obligation to maintain the *status quo* may include instances where the employer is privileged to act unilaterally, sometimes referred to as maintaining the 'dynamic status quo.'" *Id.* at 43.

The "dynamic status quo" precedents cited by DuPont rest on the premise that "the status quo against which the employer's 'change' is considered must take account of any regular and consistent past pattern of change." Gorman & Finkin, Basic Text on Labor Law at 615. "An employer modification consistent with such a pattern is not a 'change' in working conditions at all," but rather "the dynamic status quo." *Ibid.*

Whether a "regular and consistent past pattern of change" is part of status quo depends on whether the particular changes "are in fact simply automatic . . . [or] informed by a large measure of discretion." *Katz*, 369 U.S. at 746. A fully automatic change – one in which conditions of employment are changed in a "fixed" or "automatically determined amount", *Oneita Knitting Mills, Inc.*, 205 NLRB 500, 502 (1973) – constitutes an "existing condition of employment," *NLRB v. Blevins Popcorn*, 659 F.2d 1173, 1189 (D.C. Cir. 1981). In contrast, where a pattern of change "contain[s] both automatic and discretionary elements," the employer is required to bargain over the discretionary element.[9] *Ibid.* To the extent a change is "wholly discretionary," *Larry Geweke Ford*, 344 NLRB 628, 628 n.1 (2005), it does not constitute a "regular and consistent past pattern of change," Gorman & Finkin, Basic Text on Labor Law at 615, at all; that is, it "d[oes] not constitute . . . part of the status quo." *Larry Geweke Ford*, 344 NLRB at 628 n.1.

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[9] The Board's rule in *Stone Container Corp.*, 313 NLRB 336 (1993), is simply an elaboration of the dynamic status quo rule set forth in *Katz*. The *Stone Container* rule concerns *when* an employer can insist on negotiating a discrete "annually occurring event" that occurs while contract negotiations are in progress, *id.* at 336, *i.e.*, an event that occurs as part of a "regular and consistent past pattern of change," Gorman & Finkin, Basic Text on Labor Law at 615. As in *Katz*, the Board in *Stone Container* held that an employer may insist on making such a discrete change even while overall negotiations are ongoing, so long as the employer bargains with the union over the change. *Stone Container*, 313 NLRB at 336-37. *See also TXU Elec. Co.*, 343 NLRB 1404, 1407 (2004) ("[T]he employer can carry out the changes . . . [a]s long as the union is given notice and an opportunity to bargain as to those matters.").

The Board's merit pay cases provide the archetypes for these categories. The Court in *Katz* distinguished between wage increases "which are in fact simply automatic increases to which the employer has already committed himself" and "raises [which] . . . [a]re in no sense automatic, but [a]re informed by a large measure of discretion." 369 U.S. at 746. Because automatic wage increases constitute "a mere continuation of the status quo," the employer may implement them without additional bargaining. *Ibid*. In contrast, where the amount of the wage increase is discretionary, "the company [must] negotiate as to the procedures and criteria for determining such increases." *Id.* at 746-47. *See*, *e.g.*, *Blevins Popcorn*, 659 F.2d at 1189 (explaining that while "the practice of granting raises every December was an established benefit expected by the employees," "[t]he company could not unilaterally determine the size of the increase that each employee would receive; it would be required to bargain over this discretionary element"); *Mission Foods*, 350 NLRB 336, 337 (2007) ("[T]he [employer] was obliged to maintain the fixed elements of the structural wage increase program – the local wage survey and its timing – and to negotiate with the Union over the discretionary element of the structural wage increase – the amount.”).

The distinction between automatic changes, which an employer is entitled to implement unilaterally, and discretionary changes, over which an employer must bargain, is well-illustrated by the line of cases involving unilateral changes to the amount of health insurance premiums employees are required to pay. *See* DuPont Br. 40 n. 10. These cases hold that “an employer might lawfully pass on part of an externally imposed insurance premium increase to employees without first bargaining with their collective-bargaining representative” where the amount passed along is determined by a pre-existing formula, such as “a practice of [the employer] paying . . . 80 percent of the premiums and the employees 20 percent” or the practice of the employer “pay[ing] a specified amount for each employee’s health insurance, and for the employees to pay the rest.” *Maple Grove Health Care Center*, 330 NLRB 775, 780 (2000). *See Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002) (citing cases). By contrast, where “there was no indication that the employer had passed on earlier premium increases to employees on a percentage [or other automatic] basis,” the Board has held that the employer must first bargain with the employees’ union. *Ibid.*

Accord Nabors Alaska Drilling, Inc., 341 NLRB 610, 613 (2004); *Brannan Sand & Gravel*, 314 NLRB 282, 282 (1994).

Similarly, the health insurance cases also show that it is immaterial to the duty to bargain that coverage changes are made as changes to a companywide benefit plan that applies to both union-represented and unrepresented employees. *See Larry Geweke Ford*, 344 NLRB at 628 n.1, 632; *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001). In *Mid-Continent Concrete*, the employer defended its unilateral changes to a companywide health plan on the ground "that, while the insurance benefit plan changed, the status quo benefit of a right by the unit employees to participate in the group insurance plan did not change." 336 NLRB at 268. Rejecting this argument, the Board explained:

> "Should Respondent's argument prevail, all benefit plans, such as wage plans, bonus plans and vacation plans, in which unit and nonunit employees participate on a companywide basis, would be subject to unilateral action by an Employer. Such a result would be in direct contravention of the mandates of Section 8(a)(5) of the Act." *Ibid.*

Although the annual "change[s] in price or level of coverage" for the BeneFlex Flexible Benefits Plan and Medical Care Plan, JA 778, arguably constituted a discrete "annually occurring event" within the meaning of *Stone Container*, the amount of the annual change was subject to bargaining. Because DuPont "flatly refused the Union's request during contract negotiations to bargain over [DuPont's] proposed changes" at the Louisville facility, JA 17, and "unilaterally implemented the changes at a time when negotiations concerning those changes were ongoing" at Edge Moor,[10] JA 38, however, the mere fact that the annual changes themselves may have constituted part of the status quo is no defense to DuPont's unilateral changes to the price and level of benefit coverage.

Moreover, DuPont's actual changes to employee benefits ranged far beyond mere "change[s] in price or level of coverage," including such things as adding and dropping health benefit options available under the BeneFlex

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[10] DuPont's claim that "at Edge Moor the Union was given an adequate opportunity to bargain over these impending changes and chose not to do so," DuPont Br. 58, finds no support in the record. DuPont stipulated that during bargaining "the Union offered to accept the BeneFlex Plans for 2005 with all changes as announced . . . while the parties continued to bargain for a Collective Bargaining Agreement, provided that [DuPont] withdrew its proposal for new language for Article IX, Section 3," but that DuPont refused the Union's proposal. JA 643-44, ¶ 57. DuPont later "informed the Union that it was going to implement the previously announced changes to the BeneFlex Plans on January 1, 2005, stating that [the Company] felt that it had the right to do so." JA 644, ¶ 58. "The Union responded that it did not agree to the implementation, that benefits were a mandatory subject of bargaining, and that it believed that [DuPont]'s planned action was not legal." *Ibid.* DuPont nevertheless unilaterally implemented the changes. JA 644, ¶ 59.

Medical Care Plan, changing the definition of covered dependent, and adding an entirely new Legal Services Plan to the BeneFlex Flexible Benefits Plan. JA 163-64, ¶ 62; JA 165, ¶ 66. These changes were so "wholly discretionary" that they fall entirely outside the scope of the post-contract-expiration status quo. As to these changes, DuPont was under "a duty to refrain from implementation at all, unless and until an overall impasse ha[d] been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). The Board properly concluded that the Company's failure to do so constituted an unfair labor practice.

In sum, DuPont was not privileged to unilaterally change the benefits of its union-represented employees by the Board's dynamic status quo precedents, because the changes the Company made were "in no sense automatic" but rather were "informed by a large measure of [employer] discretion." *Katz*, 369 U.S. at 746. DuPont was, therefore, required to bargain with each Union before implementing the changes.

III. THE BOARD'S DECISIONS DO NOT CONFLICT WITH ERISA

Finally, DuPont argues that the Board's decisions in these cases "conflict[] with ERISA policies, because [they] result[] in the inconsistent application of a national ERISA plan," contending that "[t]he NLRB cannot simply proclaim that the expiration of the parties' collective bargaining agreement suddenly 'uncouples' the bargaining units from the rules and provisions that govern all 'BeneFlex' beneficiaries (including the reservation of rights language)." DuPont Br. 47 n. 14.

As the Board explains in its brief, NLRB Br. 41-42, this argument is jurisdictionally barred by Section 10(e) of the Act because DuPont did not raise it before the Board.[11] 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the Court" absent "extraordinary circumstances.").

Moreover, DuPont's argument lacks merit. "ERISA places no constraints on an employer's ability to design a health benefit plan in any way it sees fit," including a plan that "discriminates among classes of employees who are eligible to participate in a given program, [] provides different levels of benefits for given classes of employees, [or] [] furnishes greater levels of employer funds for various employee classifications." 4 Michael B. Snyder, Compensation and Benefits § 57:64 (2011). The only restriction on an employer's discretion in designing either a health benefit plan or a cafeteria-style benefits plan is that the Internal Revenue Code denies tax-exempt status to a plan that discriminates in favor of highly-compensated employees with regard to eligibility or benefits. 26 U.S.C. § 105(h) (health plan); 26 U.S.C. § 125(b) (cafeteria plan). Even in that regard, the tax code provides a carve-out for benefits that result from collective bargaining. *See* 26 U.S.C. § 105(h)(3)(B)(iv) (health plan); 26 U.S.C. § 125(g)(1) (cafeteria plan).

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[11] For this same reason, DuPont's argument that "[t]he Board's order, if enforced, should be enforced [only] prospectively," DuPont Br. 60, is also barred by Section 10(e). *See* NLRB Br. 36-41.

CONCLUSION

The decisions and orders of the National Labor Relations Board should be enforced.

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1. This brief complies with the type-volume limitations of Circuit Rule 32(a)(2)(B) because this brief contains 6,496 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

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